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In the Supreme Court of the United States

OCTOBER TERM, 1997

HONORABLE L.L. SAWYER, Judge of the Circuit Court of the State of Oregon for Jackson County,

Petitioner,

v.

STATE OF OREGON ex rel MARK HUDDLESTON, District Attorney for Jackson County,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is petitioner's Guarantee Clause claim moot?

2. Are Guarantee Clause claims justiciable in state but not federal court?

TABLE OF CONTENTS

	Page
Questions Presented	i
Brief in Opposition	1
Jurisdiction	1
Statement of the Case	1
Reasons Why Certiorari Should Be Denied	4
A. Mootness	4
B. Certiorari is not warranted	10
Conclusion	21

TABLE OF AUTHORITIES

Page

Cases Cited

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 5,6 20

Baker v. Carr, 369 U.S. 186 (1962) 11,14 15

Baum v. Newbry, 200 Or. 578, 267 P.2d 220 (1954) . 17,18

Board of Education v. Allen, 392 U.S. 236 (1968) 6

Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1928) 17

Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934) . . . 6

California Gillnetters v. Department of Fish & Game, 39 Cal. App.4th 1145, 46 Cal. Rptr2d 338 (1995) 17

Church of Scientology v. United States, 506 U.S. 9 (1992) 8

City of Rome v. United States, 446 U.S. 156 (1980) . . . 11

Cochrane v. Louisiana Board of Education, 168 La. 1030, 123 So. 664 (1928) 12,17

Cochrane v. Louisiana State Board of Education, 281 U.S. 370 (1930) 12

Coleman v. Miller, 307 U.S. 433 (1938) 6

Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) 4,9

D'Amico v. Schweiker, 698 F.2d 903 (7th Cir. 1983) 7

Doremus v. Board of Education, 342 U.S. 429 (1952) . . . 6

Fraternal Order of Police v. Choctaw, 933 P.2d 261 (Okla. 1996) 18

Grant v. Johnson, 15 F.3d 146 (9th Cir. 1994) 5

Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913) 20

Iman v. Southern Pacific Co., 7 Ariz. App. 16, 435 P.2d 851 (1968) 18,19
In re Duncan, 139 U.S. 449 (1891) 16
In re Initiative Petition No. 348, 820 P.2d 772 (Okla. 1991) 18
In re Natural Resources Development Act, 47 Ill.2d 81, 264 N.E.2d 129 (1970) 17
Jackman v. Bodine, 188 A.2d 642 (N.J. Super. 1963) . . . 17
Kadderley v. Portland, 44 Or. 118, 74 P. 710, 75 P. 222 (1903) 17
La Buy v. Howe Leathers Co., 352 U.S. 249 (1957) 7
Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 16,17
Mancusi v. Stubbs, 408 US 204 (1972) 8,9
Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816) 19
Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) . 16–17
Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) 12
Municipal Court v. Superior Court, 5 Cal. 4th 1126, 857 P.2d 825 (1993) 7
New York v. United States, 505 U.S. 144 (1992) . . . 15,16 18
O'Shea v. Littleton, 414 U.S. 488 (1974) 9
Ohio ex rel Bryant v. Akron Park District, 281 U.S. 74 (1930) 12
Ohio ex rel Davis v. Hildebrant, 241 U.S. 565 (1916) . . 13
Oregon v. Haas, 420 U.S. 714 (1975) 15
Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912) 11,17
Pulliam v. Allen, 466 U.S. 522 (1984) 5
Raines v. Byrd, ___ U.S. ___, 117 S.Ct. 2312 (1997) . . . 5

SEC v. Medical Committee, 404 U.S. 403 (1972) 9
State ex rel Huddleston v. Sawyer, 324 Or. 597, 932 P.2d 1145 (1997) 2,5 11,17
State v. Davis, ___ Wash.2d ___, 943 P.2d 283 (1997) 17,19
State v. Montez, 309 Or. 564, 789 P.2d 1352 (1990) . 17,18
State v. Mountain Timber Co., 75 Wash. 581, 135 P. 645 (1913) 12
University of Texas v. Camenisch, 451 U.S. 390 (1981) 8
Van Sickle v. Shanahan, 511 P.2d 223 (Kan. 1973) 18
Valley and Siletz Railroad v. Laudahl, 296 Or. 779, 788, 681 P.2d 109 (1984) 5
Weinstein v. Bradford, 423 US 147 (1974) 9
Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978) 7

Statutory Provisions

28 U.S.C. § 1257(a) 1,4,8,9
1995 Or. Laws, ch. 2, § 1 1
1995 Or. Laws, ch. 421, § 1 1
1995 Or. Laws, ch. 422, § 47 1
1997 Or. Laws, ch. 388, § 2 2
1997 Or. Laws, ch. 852, § 1 1
Or. Rev. Stat. § 34.110 (1995) 2
Or. Rev. Stat. § 34.130(4) (1995) 2
Or. Rev. Stat. § 34.230 6
Or. Rev. Stat. § 137.700 1,9

Other Authorities

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, (1988) 16

L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed 1988) 15

BRIEF IN OPPOSITION

The State accepts petitioner's statement of the opinions below and the constitutional provisions involved.

JURISDICTION

Petitioner filed a timely petition for a writ of certiorari to the Oregon Supreme Court, which denied his federal challenge to a state statute. Although the Court would ordinarily have jurisdiction to consider the petition, *see* 28 U.S.C. § 1257(a), it lacks jurisdiction because the case is moot. Mootness is discussed below as one of the reasons why certiorari should be denied.

STATEMENT OF THE CASE

Because petitioner's statement of the case is not complete, this brief supplements it. It first summarizes the procedural posture in which the issue arises. It then sets out the events that have occurred since the petition was filed.

In 1994, the Oregon voters adopted Measure 11, a statute that sets minimum sentences for certain crimes. *See* 1995 Or. Laws, ch. 2, § 1.[1] In 1995, Bobby Ron Vanzant was convicted of second-degree manslaughter. Under Measure 11, Vanzant should have been sentenced to 75 months for his crime. At sentencing, however, the state trial court ruled that the minimum sentences set out in Measure 11 violate the Equal Protection Clause. The trial court accordingly sentenced Vanzant to 20 months for manslaughter rather than the 75-month sentence that Measure 11 requires.

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[1] Measure 11 is codified as Or. Rev. Stat. § 137.700. Since Measure 11 was adopted, the legislature has amended the statute three times to permit trial courts to impose lesser sentences for some crimes, to add new crimes that are subject to mandatory sentences, and to rewrite the portion of Measure 11 that applies to juveniles. *See* 1997 Or. Laws, ch. 852, § 1; 1995 Or. Laws, ch. 421, § 1; 1995 Or. Laws, ch. 422, § 47. The legislature has not amended the sentence for second-degree manslaughter, the crime for which the defendant in the underlying criminal action was convicted.

Because the State could not challenge the trial court's ruling on direct appeal, it filed a petition for mandamus in the Oregon Supreme Court. Consistent with the then-existing procedures, the State named the trial court judge, the Honorable L.L. Sawyer, as the nominal defendant. *See* Or. Rev. Stat. § 34.110 (1995).[2] Because a petition for mandamus initiates a separate action, Vanzant was not a party to the mandamus proceeding. As the real party in interest, however, he could have intervened in the mandamus proceeding as a matter of right but chose not to do so. *See* Or. Rev. Stat. § 34.130(4) (1995).[3]

After considering the State's mandamus petition and Judge Sawyer's response, the Oregon Supreme Court held that Measure 11 is facially constitutional. *See State ex rel Huddleston v. Sawyer*, 324 Or. 597, 932 P.2d 1145 (1997). The court accordingly issued a writ of mandamus directing Judge Sawyer to impose the statutorily required 75-month sentence on Vanzant in the underlying criminal case. Judge Sawyer filed a timely petition for certiorari.

After petitioning for certiorari, Judge Sawyer held a hearing in the underlying criminal case before resentencing Vanzant. July 30, 1997 Tr. 2–19. In a memorandum filed with the trial court before the hearing, Vanzant raised some of the issues that the Oregon Supreme Court had already addressed in the mandamus proceeding and also argued that a 75-month sentence was cruel

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[2] In 1997, the legislature changed the procedures for filing a mandamus petition in the Oregon Supreme Court. *See* 1997 Or. Laws, ch. 388, § 2. The judge is no longer named as the nominal defendant. *Ibid.* Rather, the adverse party is named as the defendant. *Ibid.*

[3] Pursuant to state law, however, Vanzant's attorney received consent from Judge Sawyer to represent him in the mandamus proceeding. *See* Or. Rev. Stat. § 34.130(4) (authorizing attorney for real party in interest to represent the defendant judge with the judge's consent); *State ex rel Huddleston v. Sawyer*, 324 Or. 597, 600 n. 4, 932 P.2d 1145 (1997) (explaining state procedure).

and unusual as applied to him. Judge Sawyer rejected those challenges. *See* July 30, 1997 Tr. 18. Before imposing sentence on Vanzant, Judge Sawyer noted that the state public defender had filed a petition for certiorari on his behalf, seeking review of the Oregon Supreme Court's decision on mandamus. July 30, 1997 Tr. 18–19. Judge Sawyer told Vanzant that "in order to give [the Court] an opportunity to see whether they are going to grant [c]ertiorari or not," he was going to suspend execution of the sentence. *Ibid.* Vanzant's counsel replied that his client did not want that. Rather, he wanted Judge Sawyer to go ahead and impose the sentence. *Ibid.*

The following colloquy occurred:

> THE COURT: * * * Two weeks ago the State Public Defender filed a petition for [c]ertiorari [to] the United States Supreme Court. They are going to have the last word on this, whether I'm right or somebody else is right. And in order to give them an opportunity to see whether they are going to grant [c]ertiorari or not, I will suspend execution of that sentence until the Supreme Court has answered that question.
>
> [DEFENSE COUNSEL]: Your Honor, I don't know whether or not he wants to proceed that way.
>
> THE COURT: He does if he wants—it's up to him.
>
> [DEFENSE COUNSEL]: He's indicated to me that he would live by the Court's decision, and we discussed this, and I think that's really up to Mr. Vanzant. If I could just have a moment.
>
> THE COURT: Sure.
>
> (Pause in proceedings.)
>
> [DEFENSE COUNSEL]: At this point, he would not ask for that. If he changes his mind, we will file the appropriate motion.

> THE COURT: I can understand where he's coming from because, if they find I'm wrong and say that minimum sentences are constitutional—and that could be two years from now—then he would have to go back to prison two years from now rather than today. He'll have two years out of the way; so I can understand his position. Okay.

July 30, 1997 Tr 18–19. Judge Sawyer accordingly sentenced Vanzant to 75 months imprisonment and entered judgment on July 30, 1997. On September 2, 1997, Vanzant filed a notice of appeal in state court from the judgment in the underlying criminal case.[4]

REASONS WHY CERTIORARI SHOULD BE DENIED

Before discussing why certiorari is not appropriate, this brief first explains why the case is moot.

A. Mootness

This case arises in an unusual posture. The person who has a personal stake in the constitutionality of Measure 11 is Bobby Ron Vanzant. He is serving a 75-month rather than a 20-month sentence as a result of Measure 11. Vanzant, however, did not intervene in the mandamus proceeding, nor has he petitioned for certiorari. Rather, Judge Sawyer was the sole defendant in the mandamus action, and only he is petitioning for certiorari. There

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[4] Because Vanzant has not filed his opening brief in the state court of appeals, it is unclear whether he will challenge his criminal conviction on appeal in the state courts or raise some other issue that would result in his avoiding a Measure 11 sentence altogether. Put another way, with respect to Vanzant's criminal trial, the Oregon Supreme Court's ruling that Measure 11 does not violate the Guarantee Clause is not a final judgment within the meaning of 28 U.S.C. § 1257(a). *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 478–79 (1975) (no final judgment where further proceedings could obviate the need to reach the federal issue). It is simply an interlocutory ruling that occurred midway through Vanzant's state criminal trial and direct appeal.

is a substantial question, however, whether Judge Sawyer has any personal interest in the mandamus proceeding that would give him standing to petition.[5] Even if he does, that interest is moot.

1. Judge Sawyer's interest

Ordinarily, a trial court judge whose ruling is reversed on appeal has no interest that would give him or her standing to petition for certiorari. Judges have no personal stake in their rulings. Rather, they have only an official interest in applying the governing statutes and constitutional provisions. That official interest is not sufficient to confer standing. *See Raines v. Byrd*, ___ U.S. ___, 117 S.Ct. 2312, 2322 (1997) (members of Congress lacked standing to challenge the line-item veto because they "alleged no injury to themselves as individuals"); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994) (state court judges have no personal stake in their rulings that would give rise to an Article III case or controversy); *Pulliam v. Allen*, 466 U.S. 522, 537 n. 18 (1984) (noting proposition with approval); *Valley and Siletz Railroad v. Laudahl*, 296 Or. 779, 788, 681 P.2d 109 (1984) (adjudicative body cannot assume the role of an advocate).

Were the rule otherwise, the dissenting judges on the Oregon Court of Appeals could petition for review in the state supreme court, and the dissenting judges on the Oregon Supreme Court could petition for certiorari. Not only would such a practice be

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[5] As noted above, state procedure permitted Vanzant's attorney to represent Judge Sawyer in the mandamus proceeding. *See Sawyer*, 324 Or. at 600 n. 4, (explaining state procedure). State procedure thus permited Judge Sawyer to act as a medium through which Vanzant could raise his various challenges to Measure 11 in state court. *See ibid.* Article III, however, requires that Judge Sawyer have a personal interest in the matter if Judge Sawyer (and not Vanzant) seeks to pursue Vanzant's challenges in federal court. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989).

inconsistent with the notion of neutrality that supposedly informs judicial rulings, but it would run counter to the principle that the majority's decision binds the dissent as well as lower court judges. Institutionally, judges have no enforcement or other role that gives them standing to challenge the constitutionality of a state statute they are charged with applying. *Compare Coleman v. Miller*, 307 U.S. 433, 444 (1938) (administrative and executive officials charged with enforcing a statute have standing to defend it against constitutional challenges); *Boynton v. Hutchinson Gas Co.*, 291 U.S. 656 (1934) (same).

The only fact that potentially distinguishes Judge Sawyer from every other trial judge whose ruling is reversed on appeal is the procedural posture in which this issue arises. Under state procedure, a mandamus proceeding serves the same function as an interlocutory appeal. Judge Sawyer accordingly was named as the nominal defendant on mandamus. The writ of mandamus the Oregon Supreme Court issued was directed to him, and he was subject to a $500 fine if he refused, without good cause, to comply. *See* Or. Rev. Stat. § 34.230. If Judge Sawyer has standing to petition for certiorari, it derives solely from the possibility of a sanction if he refuses to comply with the writ. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989) (adverse state court judgment can give party standing to petition for certiorari);[6] *Board of Education v. Allen*, 392 U.S. 236, 241 n. 5 (1968) (board members faced with choice of adhering to their

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[6] The fact that the state court decided a federal issue is not sufficient to give Judge Sawyer standing to petition for certiorari. *See ASARCO*, 490 U.S., at 623–24; *Doremus v. Board of Education*, 342 U.S. 429 (1952). Rather, Judge Sawyer has standing to petition for certiorari only if the state court judgment results in a "direct, specific, and concrete injury" to him. *ASARCO*, 490 U.S., at 623–24.

view of the constitution or facing sanctions have standing to challenge constitutionality of state law).

It might be a close question whether Judge Sawyer's status as a nominal defendant in a state mandamus proceeding gave him standing to file a petition for certiorari. *Compare D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983) (administrative law judges lack standing to challenge agency instruction even though they could be disciplined for refusing to follow it);[7] *Municipal Court v. Superior Court*, 5 Cal. 4th 1126, 857 P.2d 825, 827–28 (1993) (under California law, nominal defendant in a mandamus proceeding has no cognizable interest in appealing from ruling), *with Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) (reaching issue raised by defendant judge in a federal mandamus action without addressing standing); *La Buy v. Howe Leathers Co.*, 352 U.S. 249 (1957) (same). The Court need not resolve that question, however. Whatever personal interest Judge Sawyer might have had is moot.

2. Mootness

Even if the threat of a fine for noncompliance were sufficient to give Judge Sawyer standing to petition for certiorari, that threat was extinguished once he complied with the writ. At that point, he was no longer subject to a fine, and his interest became indistinguishable from that of any other trial judge whose ruling has been reversed on appeal and the case remanded for further proceedings. At that point, Judge Sawyer had at most an abstract

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[7] The Seventh Circuit reasoned in a related context, "if administrative law judges do not have standing to bring [a] suit [in the first instance to challenge the agency's interpretation of the social security laws,] they cannot confer it on themselves bootstrap fashion, by disobeying the instruction and then complaining that their disobedience laid them open to discipline." *D'Amico*, 698 F.2d, at 906.

or official interest in the constitutionality of the sentence he had imposed on Vanzant.

To be sure, a party's compliance with a court's judgment ordinarily will not moot a case as long as the consequences of compliance can be set aside. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *University of Texas v. Camenisch*, 451 U.S. 390, 398 (1981); *Mancusi v. Stubbs*, 408 US 204, 206–07 (1972). In this case, however, compliance with the writ of mandamus completely extinguished the sole basis for saying that Judge Sawyer had standing to petition for certiorari—the threat of a sanction if he refused to comply. Reversing the state court judgment will restore nothing to Judge Sawyer. This case thus differs from the mine run of cases in which a defendant, under court order, pays a sum of money to the plaintiff, which can be repaid if the judgment is reversed.

To avoid any misunderstanding, the State does not dispute that if the Court were to hold that Measure 11 violates the Guarantee Clause, that holding could potentially affect Vanzant. But the Court's holding would have no effect on Judge Sawyer. Judge Sawyer has no personal stake in the length of Vanzant's sentence. Because only Judge Sawyer has petitioned for certiorari, his petition is moot.

Vanzant, of course, remains free to raise his Guarantee Clause claim in a petition for certiorari if that claim is raised and resolved by the final judgment in his state court criminal proceeding. *See* 28 U.S.C. § 1257(a). Nor is it inappropriate to require Vanzant to wait until the judgment in his state criminal trial is final before raising the issue on certiorari. As explained above, with respect to Vanzant, the Oregon Supreme Court's decision on Measure 11 is simply an interlocutory ruling midway through his criminal trial and state appeal. *See* note 4 *supra*.

Until the state courts issue a final judgment in his criminal case, the Court has no jurisdiction to act on any federal challenge Vanzant might make to Measure 11. *See* 28 U.S.C. § 1257(a); *Cox Broadcasting*, 420 U.S., at 478–79.[8]

One final point should be noted. This is not a case that is capable of repetition yet evading review. *Weinstein v. Bradford*, 423 US 147, 149 (1974). The issue is not one that ordinarily will evade review. Virtually any criminal defendant who is sentenced under Measure 11 can petition for certiorari without fear that the sentence will expire while the petition is pending. *See* Or. Rev. Stat. § 137.700 (listing minimum sentences). Moreover, for the case to recur for Judge Sawyer in a way that would give him standing, he would have to refuse to follow the Oregon Supreme Court's holding in the future in order to be subject to a second mandamus proceeding. The Court has hesitated to assume that a person will not comply with the law in determining whether they have standing. *See O'Shea v. Littleton*, 414 U.S. 488, 497 (1974). One should be equally hesitant to assume that a state trial court judge would willfully refuse to follow controlling state supreme court precedent. Because this case is moot, Judge Sawyer's petition for certiorari should be denied.

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[8] The general rule that compliance with a court order will not moot a case does not apply for a second reason. The Court explained in *Mancusi* that even though forced compliance with a court order ordinarily will not moot a case, the result would be different if a person who is under no obligation to comply takes action that results in compliance. 408 U.S., at 206 n 1 (distinguishing *SEC v. Medical Committee*, 404 U.S. 403 (1972)). In this case, the writ of mandamus was directed to Judge Sawyer. Vanzant was under no compulsion to ask Judge Sawyer to proceed with the sentencing. When Vanzant voluntarily asked Judge Sawyer not to suspend execution of the sentence and Judge Sawyer acquiesced in that request, any claim that Judge Sawyer may have became moot.

B. Certiorari is not warranted

Even if Judge Sawyer's federal claim were not moot, this is not an appropriate case in which to grant certiorari. The Oregon Supreme Court's decision is consistent with a long line of decisions from the Court. In holding that Guarantee Clause claims are not justiciable, the Court has not limited its decisions to the federal courts. Rather, it has applied the same rule equally to both state and federal courts. Nor is there a conflict among the lower courts that would warrant granting certiorari. No court has held, as petitioner urges, that state courts may decide Guarantee Clause claims that federal courts may not. In declining to adopt the position petitioner advanced, the Oregon Supreme Court did not create a conflict. It avoided one.

Perhaps petitioner's claim is simply a sport,[9] or it may mark a resurgence of interest in an issue that many had regarded as settled for some time. In either event, the appropriate course is not to grant certiorari now. Rather, the issue should be allowed to percolate among the lower courts. The Oregon Supreme Court has staked out a clear position that is consistent with both the Court's decisions and those of the other state courts. So far, the one other state court that has considered the Oregon Supreme Court's reasoning has agreed with it. But if, in the future, other courts were to disagree and a sharply drawn conflict were to emerge, then it might be appropriate to consider granting certiorari to resolve it. No conflict exists now, however, that warrants certiorari.

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[9] In seeking to avoid the force of the Court's cases, petitioner explains that other litigants have not argued, as he does, that the Court's Guarantee Clause decisions apply only to federal courts. *See* Pet. for Cert. 13–14.

1. The Court's decisions

Since 1912, the Court has held that Guarantee Clause claims are not justiciable. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); *see City of Rome v. United States*, 446 U.S. 156 (1980); *Baker v. Carr*, 369 U.S. 186 (1962). Petitioner does not argue that *Pacific States* or the cases that follow it were wrongly decided, nor does he ask the Court to reconsider those decisions. He argues instead that those cases establish only that Guarantee Clause claims are not justiciable in federal court. *Pacific States* and its progeny, he argues, do not foreclose state courts from deciding Guarantee Clause claims even though federal courts may not reach them.[10]

Petitioner's argument seems at odds with the Court's decisions. In concluding that Guarantee Clause claims are not justiciable, the Court has never held that its decisions apply only to the federal courts. It has never said that state courts are free to decide Guarantee Clause claims that federal courts cannot, nor has it reserved or even noted that issue. Rather, as the Oregon Supreme Court explained, the terms the Court has used to describe its holdings apply equally to state and federal courts. *See State ex rel Huddleston v. Sawyer*, 324 Or., at 621–22. The Court has explained that Guarantee Clause claims are committed "exclusively" or "solely" to Congress, not to the "courts" generally. *See ibid.* If the Court had intended to draw the distinction petitioner perceives, it presumably would have used different terms.

On several occasions, the Court has affirmed state court judgments holding that Guarantee Clause claims are not justicia-

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[10] Petitioner properly has limited his claim on certiorari to the federal question he presented in state court. *See Sawyer*, 324 Or., at 620–21 (describing petitioner's position on justiciability).

ble. *See Cochrane v. Louisiana State Board of Education*, 281 U.S. 370 (1930); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *cf. Ohio ex rel Bryant v. Akron Park District*, 281 U.S. 74 (1930). Following *Pacific States*, the Louisiana Supreme Court in *Cochrane* and the Washington Supreme Court in *Mountain Timber* held that Guarantee Clause claims are not justiciable in state court. *See Cochrane v. Louisiana Board of Education*, 168 La. 1030, 1032–33, 123 So. 664 (1928); *State v. Mountain Timber Co.*, 75 Wash. 581, 590, 135 P. 645 (1913). The Court granted review in both cases, and the petitioners[11] renewed their Guarantee Clause claims. The Court affirmed in both cases reasoning, as the state courts had, that Guarantee Clause claims are "committed to Congress and not to the courts." *Mountain Timber*, 243 U.S., at 234; *accord Cochrane*, 281 U.S., at 374.

Nothing in the opinions in either *Cochrane* or *Mountain Timber* suggests that the Court disagreed with the lower courts' resolution of the petitioners' Guarantee Clause claims. If the Court had believed, as petitioner urges here, that Guarantee Clause claims are justiciable in state but not federal court, it presumably would have said so. Had it agreed with petitioner's view, the Court presumably would have reversed and remanded that portion of the judgment so that the state courts could decide the Guarantee Clause claims that it was foreclosed from considering. The Court did not take that course, however.[12]

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[11] Although one case arose on appeal and the other on a writ of error, for ease of reference this brief refers to the parties who lost in state court as the "petitioners" in this Court.

[12] In arguing that the Court's decisions in *Cochrane* and *Mountain Timber* do not mean very much, petitioner focuses on the Court's disposition of the state courts' judgments. He argues that because both cases involved a justiciable issue (a Fourteenth Amendment claim) and a non-justiciable issue (a Guarantee Clause

(continued...)

The same conclusion follows from another case arising out of state court, *Ohio ex rel Davis v. Hildebrant*, 241 U.S. 565 (1916). In *Davis*, the Court held that a Guarantee Clause challenge to Ohio's use of the referendum failed because that question was solely one for Congress to resolve and it had done so. *Id.*, at 569–70. In explaining why the petitioner's contrary argument lacked merit, the Court reasoned:

> [A]t best the [petitioner's argument] comes [down] to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guarantee of a republican form of government, has done something which it is deemed is repugnant to that guarantee, therefore there was automatically created judicial authority to go beyond the limits of judicial authority and in doing so to usurp congressional power on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control free from judicial interference.

241 U.S., at 570. So stated, the argument fell of its own weight. *Ibid.*

It is difficult to square the Court's reasoning in *Davis* with petitioner's argument here. The Court's reasoning does not suggest that state courts retain the power to decide Guarantee

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[12](...continued)

claim), the Court could not dismiss for want of jurisdiction. Pet. for Cert. 12. Rather, he argues that "the Court either had to affirm or reverse the state courts' judgments." Pet. for Cert. 12–13.

Petitioner's focus seems surprising. It would seem that the Court's reasoning is more telling than its disposition of the state court's judgments. But even if the disposition were dispositive, petitioner's argument appears to rest on an incorrect premise. If the Court believed that the state courts had decided the Fourteenth Amendment claim correctly but erred in not reaching the Guarantee Clause claim, it was not required to affirm or reverse. Rather, it could have affirmed in part, reversed in part, and remanded to permit the state courts to decide the Guarantee Clause claims.

Clause claims even though federal courts do not. Rather, it is based on the proposition that "the Constitution has conferred the exclusive authority to uphold the guarantee of a republican form of government" on Congress. The Court's conclusion that any judicial interference would be a "usurp[ation]" of that authority applies equally to both state and federal courts. Put another way, if the Court had believed, as petitioner argues, that the Ohio courts retained the power to decide whether Congress had misapplied the Guarantee Clause, it presumably would have said so and remanded the case to allow those courts to decide that issue.

In declining to accept petitioner's argument that state courts may decide Guarantee Clause claims that the federal courts may not, the Oregon Supreme Court aligned itself with a long line of this Court's decisions. Petitioner argues, however, that two more recent cases have called those decisions into question. He relies initially on *Baker v. Carr*, but *Baker*'s holding and reasoning support the Oregon Supreme Court's decision. The Court reaffirmed in *Baker* that Guarantee Clause claims are not justiciable. 369 U.S., at 222–23. The Court reasoned that "the commitment to the other branches" of this issue, the other branches' action on this question, the need for finality in their decisions, and the "lack of criteria by which a court c[an] determine which form of government [i]s republican" lead to the conclusion that Guarantee Clause claims are not justiciable. 369 U.S. at 222–23. In reaching that conclusion, the Court relied primarily on the fact that "the Guarantee Clause is not a repository of judicially manageable standards which a court [can] utilize independently in order to identify a State's lawful government." *Id.*, at 223.

Those considerations apply equally to state and federal courts. When the Court has recognized that there is a "lack of

criteria by which a court c[an] determine which form of government [i]s republican," it is difficult to see how a state court is free to discover enforceable criteria in the Guarantee Clause. As the Court explained in *Oregon v. Haas*, 420 U.S. 714, 719 (1975), "a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." (Emphasis in original). Far from calling the Oregon Supreme Court's decision into question, the reasoning in *Baker* supports it.

Petitioner also relies on *New York v. United States*, 505 U.S. 144 (1992). In that case, the Court raised the question but did not decide whether federal courts are barred from deciding all Guarantee Clause claims. *Id.* at 185. Petitioner fails to consider the context in which the Guarantee Clause claim arose in *New York*. The issue in *New York* was whether the Guarantee Clause prevents the federal government from restricting state authority. The Clause was not invoked by a private litigant as a limit on what the State can do. It was invoked by the State as a limit on what the federal government can do.

The difference matters. In noting that contemporary commentators have suggested that the Court should address the merits of Guarantee Clause claims, "at least in some circumstances," the Court initially cites page 398 of Tribe's treatise on constitutional law. 505 U.S., at 185. On that page, Tribe explains: "[I]t need not follow from the unavailability of the guaranty clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 398 (2d ed 1988) (emphasis in original). Tribe explains that the Guarantee Clause may provide a textual basis for States to argue that the federal government's actions violate principles of federalism. *Ibid.* As

Tribe notes, "It is, after all, the states to which the clause extends its explicit guarantee."[13] *Ibid.*

The observation in *New York* does little to suggest that the issue petitioner raises merits a grant of certiorari. The apparent focus of the Court's concern in *New York* was the State's ability to raise the Guarantee Clause, not an individual's ability to raise it. Beyond that, the issue the Court noted seems antithetical to the one petitioner raises. In *New York*, the Court questioned whether federal courts might be free to consider some Guarantee Clause claims. Petitioner, however, assumes that federal courts cannot consider Guarantee Clause claims. Rather, he argues that state courts should be free to consider Guarantee Clause claims that federal courts cannot. Whatever the Court's observation in *New York* may suggest, one thing seems fairly clear: It does not suggest that state courts are free to decide Guarantee Clause claims that federal courts cannot decide. The observation in *New York* adds little to petitioner's claim that the issue he pursues warrants certiorari.

2. No conflict among the state courts

Before 1912, the decisions on the Guarantee Clause did not all look in the same direction. The first case to consider a Guarantee Clause claim held that the question was committed to Congress, not the courts. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). After *Luther*, however, state and federal courts reached Guarantee Clause claims and decided them on the merits. *See, e.g., In re Duncan*, 139 U.S. 449 (1891); *Minor v. Happersett*,

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[13] The article by Deborah Merritt, which the Court also cites, is consistent with Tribe's discussion. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70–78 (1988). Other authorities the Court cites argue for a broader exercise of jurisdiction, but only Tribe's and Merritt's discussion are consistent with the notions of federalism that inform the Court's decision in *New York*.

88 U.S. (21 Wall.) 162 (1875); *Kadderley v. Portland*, 44 Or. 118, 74 P. 710, 75 P. 222 (1903). In 1912, when faced with a case raising substantially the same issue as this case, the Court returned to its holding in *Luther* that Guarantee Clause claims are not justiciable. *Pacific States*, 223 U.S., at 151.

Since 1912, virtually all the state courts that have addressed the issue have held, as the Oregon Supreme Court did here, that Guarantee Clause claims are not justiciable in state court. *See State v. Davis*, ___ Wash.2d ___, 943 P.2d 283, 286 (1997); *California Gillnetters v. Department of Fish & Game*, 39 Cal. App.4th 1145, 1163, 46 Cal. Rptr2d 338 (1995); *In re Natural Resources Development Act*, 47 Ill.2d 81, 264 N.E.2d 129, 133 (1970); *Jackman v. Bodine*, 188 A.2d 642, 647 (N.J. Super. 1963) (Paschman, J.); *Baum v. Newbry*, 200 Or. 578, 267 P.2d 220 (1954); *Borden v. Louisiana State Board of Education*, 168 La. 1005, 1023, 123 So. 655 (1928). The one case that has considered the issue since the Oregon Supreme Court decided this case specifically noted and agreed with the Oregon Supreme Court's decision. *See Davis*, 943 P.2d, at 286 n. 2.

Conversely, no state or federal court has held, as petitioner urges, that state courts may decide Guarantee Clause claims even though federal courts may not, although one state court decision did raise that possibility. *See State v. Montez*, 309 Or. 564, 603-04, 789 P.2d 1352 (1990). In *Montez*, the Oregon Supreme Court noted that state courts may be able to decide Guarantee Clause claims even though federal courts cannot, but it did not base its holding on that proposition. *Ibid.* Since then, no court has followed *Montez*, and the Oregon Supreme Court's decision in this case disclaims it. *Sawyer*, 324 Or., at 621 n. 19. *Sawyer* makes clear that the suggestion in *Montez* retains no vitality in

Oregon. *Ibid.* At most there was an intra-state conflict,[14] which the Oregon Supreme Court's decision in this case resolved.

Petitioner and the amicus brief, however, say that there is a "contemporary conflict in state decisions." Am. Br. 5 (capitalization omitted). They only cite, however, three cases in which state courts have specifically addressed justiciability. In one of the three cases, *In re Initiative Petition No. 348*, 820 P.2d 772, 779 n. 21 (Okla. 1991), the Oklahoma Supreme Court noted the issue but did not resolve it. In a later case, the Oklahoma Supreme Court made clear that it took "no stand on the justiciability of the issue." *Fraternal Order of Police v. Choctaw*, 933 P.2d 261, 270–71 (Okla. 1996).[15]

In the second of the three cases, the trial court had rejected the plaintiff's Guarantee Clause claims without any explanation. *See Iman v. Southern Pacific Co.*, 7 Ariz. App. 16, 435 P.2d 851, 854–55 (1968). On appeal, the Arizona Court of Appeals held that Guarantee Clause claims are not justiciable and reasoned that the trial court's unexplained ruling properly could have rested on that ground. *Ibid.* The court noted alternatively that if the trial court had reached the merits, it correctly held that the initiative is consistent with the Guarantee Clause. *Ibid.*

In the last of the three cases, the Kansas Supreme Court held in 1973 that neither federal nor state courts are precluded from addressing some kinds of Guarantee Clause claims. *See Van Sickle v. Shanahan*, 511 P.2d 223, 232–34 (Kan. 1973). Almost

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[14] Before the suggestion in *Montez*, the Oregon Supreme Court had squarely held in *Baum v. Newbry*, 200 Or., at 585, that Guarantee Clause claims are not justiciable in state court.

[15] In both cases, the Oklahoma Supreme Court followed the Court's lead in *New York*. It declined to decide whether the issue was justiciable holding instead that the claim had no merit. *See Fraternal Order of Police*, 933 P.2d, at 270–71; *In re Initiative Petition No. 348*, 820 P.2d, at 779.

25 years have passed since *Van Sickle* was decided. No court has followed it, and it does not address the issue petitioner seeks to raise here—whether state courts can decide Guarantee Clause claims that the federal courts cannot. Finally, the amicus brief lists five cases in which state courts dismissed Guarantee Clause claims on the merits without ever considering whether they were justiciable. *See* Am. Br. 6.

Those cases provide no basis for saying that there is a conflict that requires resolution. One case takes no position on the issue, another agrees with the Oregon Supreme Court,[16] a third addresses a different issue, and the remaining decisions never even consider the issue. Something far more than that is required before it can be said that there is a clearly drawn split among the state courts that warrants certiorari.

3. State and federal courts

Petitioner's argument that Guarantee Clause claims are justifiable in state court but not federal courts (including this Court) raises one final concern. It seems at odds with the long-standing principle that the Court is the final arbiter of the federal constitution and sits to ensure that the state courts interpret federal law uniformly. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816). Under petitioner's view, each state court would be the final arbiter of what the Guarantee Clause means within that State. The Court would be powerless to review any of those decisions, no matter how much the various state courts differed or how implausible their interpretations of the Guarantee Clause. And the citizens of a State would effectively be power-

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[16] In reviewing the state court decisions, the Washington Supreme Court regards the Arizona Court of Appeals' decision in *Iman* as supporting the proposition that Guarantee Clause claims are not justiciable. *See Davis*, 943 P.2d, at 286.

less to change their state court's interpretation of federal law.[17] *Compare Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 284 (1913) (holding in a related context, that a similar rule was unacceptable because it would result in constitutional paralysis).

Petitioner, however, relies on a separate opinion in *ASARCO* to discount that concern. *See* Pet. for Cert. 16 (quoting *ASARCO*, 490 U.S., at 636 (Rehnquist, C.J., concurring and dissenting)).[18] He argues that unreviewable state court interpretations of federal law are a "'rather unremarkable proposition.'" *Ibid.* The portion of the separate opinion that petitioner quotes, however, expresses the dissent's views, not those of the majority. More importantly, the issue in *ASARCO* differs from the issue here. If the dissent had prevailed in *ASARCO*, the Court would have been precluded from deciding whether the state court's resolution of the federal issue in that case was correct, but it would not have been precluded from deciding the same federal issue in another case.[19] Under petitioner's proposal, however, the Court would be precluded from reviewing an entire class of federal claims. Under petitioner's view, no state court

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[17] The citizens of each State retain the power to amend their own state constitutions, but it would be a far more daunting task for one State's citizens to amend the federal constitution if they believed that their state courts had misinterpreted the Guarantee Clause.

[18] The amicus brief quotes from the same opinion at greater length. *See* Am. Br. 8.

[19] In *ASARCO*, the state court plaintiff lacked Article III standing. If the dissent in *ASARCO* had prevailed, the Court would have been precluded from deciding whether the Arizona state courts had correctly decided the federal issue in that case, but it would not have been precluded from deciding the same federal issue in another case where the plaintiff had standing. At most, the dissent's view would have precluded the Court from either error correcting or from reaching a significant federal issue in the first case to present it. It would not have precluded the Court from ever reaching the issue, as petitioner would.

Guarantee Clause decision would be reviewable. There is a difference in magnitude between those two propositions.

Perhaps that is not an insurmountable hurdle. But it at least should give one pause. At a minimum, the novelty of petitioner's position suggests that this is the sort of issue that should percolate among the lower courts before the Court considers granting certiorari. At this point, no court has held that state courts may decide Guarantee Clause claims that federal courts may not. The Oregon Supreme Court has staked out a clear position, and the one court that has considered the Oregon Supreme Court's decision has agreed with it. If, in the future, other state courts were to adopt the theory petitioner urges, perhaps it would be appropriate then to consider granting certiorari to resolve it. At this time, no conflict exists that would warrant granting certiorari.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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